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CITATIONS

548373—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 244

THE MORRISDALE COAL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 95) is reported at 135 F. (2d) 921. The first opinion of the District Court (R. 81–83) is reported at 46 F. Supp. 356. A second opinion of the District Court, limited to a determination of the amount of judgment in favor of the United States (R. 84–85), is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 10, 1943 (R. 96–97). The petition for a writ of certiorari was filed August 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States may sue a taxpayer and its surety on a surety bond given to the Collector of Internal Revenue to obtain a postponement in the collection of its tax until the Commissioner of Internal Revenue finally acted upon the taxpayer's claim for abatement of an additional tax assessed against it.

STATUTE INVOLVED

The pertinent provisions of the statute involved are printed in the Appendix, *infra,* pp. 8–14.

STATEMENT

This suit was brought by the United States in the District Court of the United States for the Eastern District of Pennsylvania, as the real party in interest, pursuant to Rule 17 (a) of the Federal Rules of Civil Procedure, upon a bond given to a former Collector of Internal Revenue (Blakely D. McCaughn, Collector for the First Collection District of Pennsylvania) on December 1, 1921, by the Morrisdale Coal Company, as principal, and the American Re-Insur-

ance Company, as surety, to stay the collection of additional income and excess-profits taxes in the total sum of $82,262.01 for the years 1917 and 1918 (R. 4–10). American Re-Insurance Company filed an answer (R. 11–16) impleading subsidiary companies of Morrisdale Coal Company, and asked that it be permitted to deposit in court the principal amount of the bond and withdraw from the proceeding. The District Court entered an order on June 21, 1939, as prayed, authorizing American Re-Insurance Company to deposit in court the principal sum of $82,262.01 plus interest from the date of demand for payment, January 10, 1939, to the date of deposit, and discharging it from further liability (R. 26–27). Morrisdale answered, denying liability and pleading special defenses (R. 21–26).

The proceeding was submitted on a motion for summary judgment filed by the United States (R. 27–28), supported by affidavit and exhibits (R. 28–60), and a motion to dismiss filed by Morrisdale Coal Company (R. 61–62), supported by affidavits and documentary exhibits (R. 62–80). The affidavits covered all of the facts essential to the determination of the issues involved, and such facts are summarized in the District Court's first opinion (R. 81–83).

In August 1921, the Commissioner of Internal Revenue assessed additional taxes against Morrisdale Coal Company in the respective amounts of $22,804.39 and $141,719.64 (R. 6, 22, 81). The

Collector of Internal Revenue made demand, and on October 27, 1921, the company filed claims for abatement. On December 1, 1921, the company paid about half of each assessment, leaving an unpaid balance of $11,402.20 for 1917 and $70,669.45 for 1918, and the bond here sued on was given in the principal amount of $82,071.65, to stay collection of this unpaid balance. (R. 6–8, 22–24, 81.)

The obligee of this bond (R. 10–11) was "Blakely D. McCaughn, Collector, First District, Pennsylvania." It recited the assessments for the respective years, the payments on account, and the filing of abatement claims for the balance (R. 11, 81).

In 1925 the Government's claim with respect to additional taxes for 1917 was finally adjusted, and the balance due for that year was paid in 1925 (R. 6–7, 22, 81).

The claim for abatement of the additional assessment for 1918 was denied, and the denial resulted in protracted litigation of the company's liability for the additional assessment for that year and for later years. The Commissioner's determination was affirmed by the United States Board of Tax Appeals in an unreported memorandum opinion and by the Circuit Court of Appeals for the Third Circuit in *Morrisdale Coal Co.* v. *Commissioner,* 97 F. (2d) 272 (1938).

On January 10, 1939, the Collector made demand on the taxpayer for payment of the outstanding

and unabated portion of the additional assessment for 1918, amounting to $70,669.45, and on refusal to pay this action was brought (R. 82).

On the basis of the facts before it the District Court ordered judgment entered for the United States (R. 83). In a subsequent opinion, however, that court held that the Government could recover on the bond only to the extent that it applied to 1918 taxes (R. 84–85) and entered judgment for the United States in the sum of $72,556.65 (R. 85–86). Both parties appealed (R. 86–87), and the District Court's decision was affirmed by the Circuit Court of Appeals for the Third Circuit (R. 95–97).

ARGUMENT

There is no sufficient basis for granting certiorari in this case. The proceeding was instituted by the United States as the real party in interest, pursuant to Rule 17 (a) of the Federal Rules of Civil Procedure, to recover on a surety bond given to a former Collector of Internal Revenue to secure a stay in the collection of federal income taxes which had been assessed by the Commissioner of Internal Revenue. One ground urged for granting certiorari is that the question is of general importance in the construction of Rule 17 (a) and also of Rule 56 (c) of the Federal Rules of Civil Procedure (Pet. 5). The argument is that the Government did not prove it was the real party in interest; that the bond in question was given to the former Collector solely for his

personal protection; and that the Collector must be considered as an entity separate and apart from the Government for purposes of the suit on the bond (Br. 7–10).

The bond was given to secure taxes assessed by the Commissioner of Internal Revenue and it ran to McCaughn as Collector of Internal Revenue (R. 10–11). The contention that the Government is not the real party in interest is predicated upon the distorted interpretation of the Collector's request that the bond be filed "for his own protection" (R. 71), as meaning that it was furnished for his "sole protection" (R. 65). The point is wholly without merit. The objection made to the motion for summary judgment, that there was a genuine issue of material fact, is predicated upon the same erroneous theory that the United States is a stranger to the action. The District Court found that there was no dispute as to any fact deemed material (R. 81).

United States v. *Kales,* 314 U. S. 186, and *United States* v. *Nunnally Investment Co.,* 316 U. S. 258, did not involve the question whether the Collector, instead of the United States, has the right to enforce tax claims. The same distinction applies to these cases which taxpayer asserts in connection with Section 503 of the Revenue Act of 1942, c. 619, 56 Stat. 798. See Brief 6, footnote 1.

The theory upon which a successor Collector is recognized as entitled to sue upon a bond given

to a named Collector "or his successors" (*Fix* v. *Phila. Barge Co.,* 290 U. S. 530) is sufficiently broad to allow the United States itself to sue. Such a bond was involved in *Gulf States Steel Co.* v. *United States,* 287 U. S. 32, and the right of the United States to sue upon it was not questioned. If this practice could have been doubtful before, the new Rules of Civil Procedure, effective in 1938, make it clear that the United States may properly institute the action as the real party in interest. There is thus no conflict with the dictum in *Bowers* v. *American Surety Co.,* 30 F. 2d 244 (C. C. A. 2d), certiorari denied, 279 U. S. 865, or with *United States* v. *National Surety Corp.,* 103 F. 2d 450 (C. C. A. 8th), affirmed, 309 U. S. 165. They state only a general rule and recognize that there are exceptions. Cf. *United States* v. *National Surety Corp.,* 309 U. S. 165, 170.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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